of its passing is too well known to need restatement; it is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament — and not only of Parliament but of Ministers also — cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited:.....

"The second part of the passage that I have cited from the judgment of the learned Lord Justice is no doubt the logical sequel of the first. The court, having discovered the intention of Parliament and of Ministers too, must proceed to fill in the gaps. What the legislature has not written, the court must write. This proposition .....cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act."

I am thus driven to the conclusion that irrespective of whether section 11 gives a party any right of appeal against a decision of the Rent Board it certainly fails to give this Court any jurisdiction to entertain such an appeal, and I must therefore refuse to exercise such a jurisdiction.

I would add that I have considered the question of whether in view of the fact that the point of want of jurisdiction was not taken by either of the parties I should not hold that it has been waived. On such a point, however, it seems to be that where there is a complete lack of jurisdiction there can be no question of waiver and that it is the duty of the Court to take and deal with the point if it is not raised by the parties. As was said by Viscount Simon, L.C., in the case of *Westminster Bank Ltd. v. Edwards*[8] :—

"A court not only may, but should take objection where the absence of jurisdiction is apparent on the face of the proceedings. Thus, an appellate court not only may, but must, take the objection that it has no jurisdiction to hear an appeal if it is apparent that no right of appeal exists. Vaughan Williams, L.J. in **Norwich Corporation v. Norwich Electric Tramways Co., Ltd.**, formulated the proposition thus: 'If the court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in my opinion, to give effect to that view, taking, if necessary, the initiative upon itself.' "

There will accordingly be no order in the present proceedings and the appellant as the party who initiated them will pay the taxed costs.

No order.

NYALCHAND MOTICHAND & CO. v. A. S. MOHAMED MYDIN; V. VARUSAY RAWTHER, 3rd party *.

[Court of Appeal (Mathew, C.J. (F.M.), Sir Charles Murray-Aynsley, C.J. (Singapore), and Pretheroe, J.) August 11, 1952]

[Penang — Civil Appeal No. 53 of 1951]

Carriage of Goods by sea — Common law — Carriers — Carriage of goods by lighter owners — Liability of — Common carriers distinguished.

* As we go to press we understand that leave to appeal to the Judicial Committee of the Privy Council has been granted. — *Ed. M.L.J.*

This was an appeal from the decision of Spenser Wilkinson, J. reported in (1951) M.L.J. 197. The question at issue was whether the respondent who was a lighter-owner was liable for damage caused to goods shipped by the appellants where negligence has not been established.

At the trial the appellants based their claim on negligence and on the liability of the respondent as a common carrier. The learned trial Judge found against both these claims and dismissed the suit. The two main grounds of appeal were that the learned trial Judge was wrong in finding that the defendant was not a common carrier, or alternatively he was under the same liability as a common carrier.

Held, (Pretheroe, J. dissenting) that (1) the liability of shipowners as insurers of goods carried by them is a doubtful question; (2) whilst lighter owners are never common carriers they are nevertheless under the same liability as a common carrier in respect of loss of or damage to goods carried by them.

Liver Alkali Co. v. Johnson[1] followed.

Cases referred to :—

(1) *Liver Alkalai Co. v. Johnson* 7 Ex. 267 and 9 Ex. 338.
(2) *Consolidated Tea & Lands Co. v. Oliver's Wharf* (1910) 2 K.B. 395.
(3) *Misa v. Currie* (1876), 1 App. Cas. 599.
(4) *Tamvaco & Co. v. Timothy & Green* (1882) Cab. & El. 1.
(5) *Electric Supply Stores v. Gaywood* 100 L.T. 855, 856.
(6) *Belfast Ropework Co. v. Bushell* (1918) 1 K.B. 201.

COURT OF APPEAL.

N. L. Macassey for the appellants.
F. G. Pooley for the respondent.
C. D. D. Hogan for the 3rd party.

Cur. Adv. Vult.

Mathew, C.J., (F.M.) : — The facts in this case are not in dispute The plaintiffs, who are merchants, employed the defendant, who is a lighterman, to carry 500 bags of betel-nuts from Weld Quay, Penang to the "S.S. Union Power" which was at anchor in the Penang roads. The defendant had no vessel to transport the betel-nuts, and arranged for another lighterman (who was made the third party) to transport the goods on his behalf. Three hundred and forty bags had been loaded into a lighter when work stopped. The lighter was resting on the foreshore and the tide was low. By midnight the lighter was afloat and it was found that there was some water in the bilge which the crew baled. Some hours later the lighter was found to be taking in more water than could be reduced by baling. The goods were transferred to another lighter, but by that time 90 bags had been damaged by sea water. The precise loss which the plaintiffs sustained was not determined by the learned trial judge. On examination, the lighter was found to be freshly holed, and this can only have been caused by the lighter sitting at the time of loading on wreckage concealed in the mud.

The plaintiffs based their claim on the negligence of the defendant or, in the alternative, that the defendant was liable as a common carrier.

The learned trial judge in a carefully considered judgment found that the defendant had not been guilty of negligence and that the defendant was not a common carrier. On these findings he dismissed the suit.

On the hearing of the appeal, Mr. Macassey who appeared for the appellants argued the appeal on two main grounds:—

(i) that on the facts the proper inference to be drawn was that the defendant was a common carrier and that the Rules of the Lighter Owners' Association, Penang, of which he was a member, although restricting the number of customers he could serve, did not deprive him of his character as a common carrier;

(ii) that whether he was or was not a common carrier he had none the less the liability to carry safely and was liable as an insurer.

The question for determination is the extent of the liability of a lighter-owner for goods damaged while in his possession where negligence has not been established.

The leading case on the liabilities of lightermen is *Liver Alkalai Co. v. Johnson*[1]. This defendant was a barge owner and let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini, but the customers fixed in each particular case the points of arrival and departure. The salt-cake that was being carried was damaged as the result of a peril of navigation. It was held that the defendant had assumed the liability of a common carrier and was liable, though the goods were lost without negligence on his part.

The effect of this decision is very clearly set out by Hamilton, J., in *Consolidated Tea & Lands Co. v. Oliver's Wharf*[2] at page 399 :—

"The liability of the defendants in respect of this transportation rests upon the rule which was established after much discussion in **Liver Alkali Co. v. Johnson**, and the gist of that decision was that if the defendants were exercising the public employment of carrying goods by water, which was a question of fact, then there would be attached to that employment the same liability with regard to the safety of the goods as the law imposes upon common carriers. The question whether the defendants in the present case exercised the public employment of carrying goods by water is one which I think on the facts must be answered in the negative. In the **Liver Alkali Co's.** case the defendant, who was found to exercise this public employment, not only owned the flats, but sent them out under the care of his own servants plying about to and from places in the Mersey indifferently both as to the points of departure and as to the points of arrival. Although he always carried goods for one person at a time, and made an express agreement with that person for the voyage, it was clear that every one who had goods to be carried was a possible customer. Not being a common carrier, he was not compellable by law to take the goods of the first comer, but he held himself out in the ordinary course as ready to do business with all and sundry."

And on page 400 :—

"With regard to the other cases cited, **Ingate v. Christie**, and **Hill v. Scott**, they only appear to me to emphasise the rule laid down in **Liver Alkali Co. v. Johnson**, (9 Ex: 338), directing special attention to the distinction between willingness to serve every one who asks and willingness to serve only particular favoured persons, and to the distinction between the carrying on of the public employment of carriers and the mere occasional rendering to the customer of the warehouse the subsidiary service of collecting and carrying his goods from the import steamer."

The learned trial judge found that the defendant was not a public and general lighterman and therefore did not have the liability of a common carrier. The reasons to support this finding are put by the learned trial judge as follows :—

"Whether a man is a common carrier, or a general lighterman, is a question of fact. It seems to me that a man whose business is restricted to a list of regular customers and who scarcely ever has the opportunity to carry for a member of the general public is not a common or general carrier and that it would be artificial to make him liable as such, merely because he is willing to carry for a stranger on rare and isolated occasions. I do not think that the issue is affected by the fact that he can, and does, make additions to his list of regular customers; obviously he would not add a new customer without some enquiry as to the probable volume of traffic, to enable him to judge whether his fleet of lighters would ordinarily suffice. If he had to pass on three-quarters of the new work to other firms there would be more trouble than profit and also the committee of the Association would probably interfere. This element of selectively prevents additions to the list from affecting his character as a private rather than a public lighterman."

With respect, I do not agree with the reasoning which led the learned trial judge to come to this conclusion. The practice followed by the lightermen in Penang, who are members of the Lighter Owners Association, is described in the following passage from the evidence of the defendant :—

"The Lighter Owners Association was formed pre-war but registered in 1949. There were rules pre-war — unwritten rules. We had an understanding — for mutual help — not to undercut — not to crimp each other's clients. I agree it would be more accurate to say that we registered our customers with the Association than that we registered our contracts.

Q: Anybody could come to you and say "ship 100 bags to-morrow"?

A: No — not anybody — he would have his own contractor.

By Court: What about the casual or private customer — not in regular business in Penang?

A: If I had a tongkang and he offered a reasonable rate, certainly I would unload for him.

The point is that I must not work for anyone on another lighterman's list. A casual customer who is not on another list can employ me to-day and any other lighterman next month.

Q: The only thing is that he must pay a reasonable rate?

A: Yes, and provided I have a tongkang available.

Q: No other conditions?

A: He will have to come to the place of unloading and remove the goods as soon as landed. I have an office — business premises — it has a small sign-board.

Q: The public can go into your shop?

A: To do what?

Q: The casual customer might see your board and enquire?

A: Yes, in that case he can come. I do not advertise. I do not know of any lightering firm which advertises in newspapers but some of them do so in advertisement pamphlets. I have done it myself — chiefly in order to get rid of an importunate advertising tout."

In re-examination he appeared to go back on what he had described in some detail in cross-examination, but the evidence of A. K. S. Rawther described in similar terms what the defendant had said in cross-examination, and his evidence was accepted by the learned trial judge.

The practice of the lightermen is only very sketchily described in rule 3 (a) of the Rules of the Lighter Owners Association, Penang, and reads :—

"To unite, promote, protect and watch over the welfare and general interests of persons, firms or bodies corporate or unincorporate engaged or concerned in the transport of goods by Native Sailing Vessels in the seas around or adjoining the island of Penang and the coast of North Malaya."

Rule 9 provides for the keeping of a register of members and the keeping of a register of contracts. Rule 11 sets out the obligation of members, and sub-rule (c) thereof provides :—

"Members should not either directly or indirectly enter into contracts with firms or individuals which have been registered as having entered into contracts with another Member provided such contracts have been registered in the Register of contracts kept by the Secretary and have not expired or been cancelled by mutual agreement."

On the heading of his note-paper the defendant describes himself as :—

"A. S. Mohamed Mydin, Esq., Tongkang Owner and Landing and Shipping Contractor, No. 20 Penang Street, Penang."

It appears to me that a number of lighter owners of Penang have, for their own convenience, agreed not to carry for firms or individuals which have entered into contracts with other members of the Association, but it is clear that they are not precluded from carrying for others who have not made an agreement, generally verbal, with any other members of the Association. Casual customers do not appear to be frequent, no doubt because the greater part of the carrying to and from vessels lying out in Penang harbour is done through firms who have been established for a number of years in Penang and are accustomed to being served by a particular lighterman.

In my view, the defendant professed to carry on the business of a lighterman, and his liability is only restricted if it can be said that his membership of the Association deprives him of the character of a lighterman who exercises a public employment. I am of the opinion that it does not. The lightermen of Penang hold themselves out as willing to carry goods for all and sundry but, by a domestic arrangement amongst themselves, agree not to carry for firms or individuals which have registered agreements with other lightermen. It is an arrangement which is agreeable to the lightermen as it tends to prevent undue competition, and is convenient to the merchants of Penang as the lightermen they employ will always ensure, as in the present case, that lighters are always made available for the carriage of their customers' goods. The fact that the defendant "should not" carry for the registered customers of other members of the Association does not in my view place him in the class of a carrier who will only carry for a favoured few and is therefore relieved of the extended liability attaching to a common carrier.

I would allow this appeal with costs, the respondent to pay the costs of the third party. The deposit in Court will be paid out to the appellants. The case should be referred back to the Court below for the purpose of assessing damages.

Sir Charles Murray-Aynsley, C.J., (Singapore): — This appeal depends on a short point, namely, the liability of lighter-owners for goods damaged without their negligence.

The question of liability of shipowners is a rather doubtful question. The conflicting authorities are set out at p. 221 of the 15th Edition of *Scrutton*. The question is to what extent are shipowners insurers. Are they ever liable as insurers? Are they so liable when they happen to be common carriers? This could only apply to general ships. Is there a special form of liability attaching to shipowners, distinct from that of common carriers? The whole question must be regarded as an open one pending a decision of the House of Lords.

We are only concerned with the particular case of lighter-owners. These are never common carriers. I think that the matter is concluded for us by the case of the *Liver Alkalai Co. v. Johnson*[1]. The learned Judge distinguished that case on the ground that in the case under consideration the respondents as members of an association of Indian lighter-owners were prohibited by the rules of the association from accepting employment from those who were registered as customers of other members. I do not think that the distinction is valid. In the first case their liability does not depend on their being common carriers which they are not in any event. Secondly I do not think that an agreement of this kind could affect their liability. It is I think sufficient that they profess to carry on the business of lighter-owners.

I do not know if the *Liver Alkalai*[1] case was rightly decided or, if it were, whether it decided the question of liability of shipowners generally or merely imposed a special liability on lighter-owners.

I consider, however, on the state of the authorities binding on us, that the appeal should be allowed with costs. The respondents to pay the costs of the third parties. Deposit to be paid out to appellants.

Pretheroe, J.: — The plaintiffs are merchants in Penang and in November, 1949, they proposed to export 500 bags of betel-nuts by the "S.S. Union Power" which was at anchor in Penang harbour at the time. The defendant, who is "a tongkang and landing and shipping contractor", was employed to transport the bags of nuts from Weld Quay to the abovenamed ship. As the terms of that contract are the subject

matter of the suit I need not refer to them at this stage. At the time the defendant had no tongkang of his own available so he "passed on the order" to another tongkang owner. This latter tongkang owner was made the third party to the suit. On November 27th 342 bags of nuts were loaded into a tongkang belonging to the third party and were then covered with a tarpaulin and left for the night. During the night, owing to the falling tide, the tongkang fouled an obstruction on the bed of the harbour and sprang a leak. As a result 90 bags of nuts were damaged by salt water and in this suit plaintiffs claimed damages in respect of those 90 bags. In an amended Statement of Claim plaintiffs claimed the sum of $2,850 as the damage to the nuts was "due to the negligence of the defendant" or, alternatively, the same sum as defendant "is liable as a common carrier." The defendant denied that he was a common carrier and likewise he denied that the damage was due to his negligence. He further alleged that "by the custom of the port of Penang lightermen are responsible for loss or damage to cargo carried by them only where such loss or damage results from the neglect or default of the carrier." For a reason which will appear later this judgment is not concerned with the liability, if any, of the third party.

When the case came up for trial the learned trial Judge took time and then delivered a long and carefully prepared judgment. He found that there had been no negligence on the part of the defendant and that defendant was not a public and general lighterman and therefore did not incur the liability of a common carrier. Consequently he dismissed the claim. From this decision the plaintiffs appealed as against the first defendant only.

The Memorandum of Appeal set out nine grounds but Mr. Macassey, who appeared for the appellants, made it clear that his case was based on two main grounds viz. that the learned trial Judge was in error in finding that the defendant was not a common carrier or, alternatively, even if the defendant was not a common carrier, he was under the same liability as a common carrier by water. Mr. Pooley, for the respondent, at once objected to the alternative submission on the ground that appellants were precluded by their pleadings from making it: the pleadings had in unequivocal terms asserted that defendant was liable as "a common carrier." I do not think that Mr. Macassey's second ground of appeal was either totally inconsistant with, or contrary to, the original case. Rather I think it was a new argument on the same matter that had been before the lower Court. In my opinion, therefore, the objection was rightly overruled. (*Misa v. Currie*[3]).

It is necessary at this stage to consider the nature of the contract between the plaintiffs and the defendant. In the Port of Penang the lightermen have formed an Association known as "The Lighter Owners Association, Penang", and the defendant was a member of that Association. By the rules of that Association all members are bound to observe those rules under penalty of expulsion from the Association. One rule requires each member to register "the names of the firms or individuals with whom each individual member holds contracts or agreements." Then rule 11(c) provides that no member shall enter into any contract with any "firm or individual which have (sic) been registered as having entered into contracts with another member" and such contracts have not expired. The evidence shows that a lighterman may have entered into contracts with a number of firms though some contract with one firm only and, in one case at least, one firm employs two lightermen one of whom transports rice exclusively while the other transports the rest of the firm's produce. The lightermen supply the lighters and provide the crews and whenever so required, they transport the cargo from Weld Quay to any designated ship in the harbour. Perhaps I should mention one other fact as it may have a bearing on the case. There was evidence that, if approached by a person who was not registered by any member of the Association, a lighterman is free to transport the goods of such person if he wishes so to do. But there was also evidence that such a contract was of rare occurrence.

Before proceeding further it should be noted that a person may be a common carrier by water for the purpose of one voyage and a private carrier for the purposes of another voyage. (*Tamvaco & Co. v. Timothy & Green*[4] and per Pickford, J., in *Electric Supply Stores v. Gaywood*[5]). The carrier's status in respect of any particular voyage is a question of fact and not of law. (*Belfast Ropework Co. v. Bushell*[6]). I have thought it necessary to refer to this point because in the lower Court, and during the arguments before this Court, there was a tendency to treat the issue as being "are the Penang lightermen common carriers?" whereas the issue is, "was the respondent a common carrier for the purpose of the voyage during which this casualty occurred"?

Now all the authorities I have been able to trace are in agreement regarding one attribute of a common carrier. He must hold himself out as being willing to carry any goods offered by any person. The numerous authorities for this proposition are set out in a footnote at 4 *Hailsham* 4. There are minor exceptions to the proposition but none of them are applicable to the the facts of this case. It is also common ground that if a person carries for particular persons only then he is not a common carrier.

On the evidence in this case can it be said that the respondent, for the purposes of the particular voyage concerned, was holding himself out as being willing to carry goods for any and every person? As

I view the facts the answer must be an emphatic "no." In the first place, it is clear that he would not accept cargo from any one of a very numerous class of persons *viz.* all those importers and exporters who were registered with the Penang Lighter Owners Association as being the "employer" of another lighterman. Again, there is evidence that, even if a merchant who has no registered lighterman, offered a cargo the lightermen consider themselves at liberty either to accept it or to refuse it. On this point the second witness for the defence, who is himself a Penang lighterman, said "even if I had a tongkang available I would consider myself at liberty to refuse." At an earlier stage this witness said "if anyone not on my list asked me to take goods to a ship I would refuse the order whether" (it was) "a business house or a private customer." The second witness for the plaintiffs testified that "I was instructed to give all our work to him" (the respondent) ... If I were to try to engage another lighterman he would refuse." And finally, the fourth witness for the defence, who was the Secretary of the Penang Lighter Owners Association, said "If a customer cancelled his contract no other lighterman would work for him." On those facts it appears impossible to hold that respondent was, for the purposes of that voyage, holding himself out as willing to accept cargo from anyone, whoever he might be. Rather the position was that he, as a lighterman, was carrying for his registered "employer" in accordance with the terms of a special contract made with that "employer". It seems clear to me, therefore, that, at the time of the casualty, respondent was not employed as a common carrier. Firstly, he was not holding himself out to carry goods for anyone who might offer them, and secondly, he was bound by a special contract to a particular person (referred to throughout the evidence as "his employer"). Either of these grounds is sufficient to prevent the respondent from being a common carrier and for these reasons I am, with respect, in agreement with the finding of the learned trial Judge on this point.

Mr. Macassey's second submission was that, even if the defendant was not a common carrier, he was under the same liability as a common carrier by water.

Numerous authorities were cited in support of this submission but the most important was the leading case of *Liver Alkalai Co. v. Johnson*[1]. There is some speculation regarding the scope of the decision in this case but for present purposes I think it creates few difficulties. Blackburn, J., defined the issue in the following manner:—

> "The question, therefore, raised is, whether the defendant was under the liability of a bailee for hire, viz. to take proper care of the goods, in which case he is not responsible for this loss, or whether he has the more extended liability of a common carrier, viz. to carry the goods safe against all events but acts of God and the enemies of the Queen."

His Lordship then went on to say:—

> "We have purposely confined our expressions to the question 'whether the defendant has the liability of a common carrier', for we do not think it necessary to inquire whether the defendant is a carrier so as to be liable to an action for not taking goods tendered to him."

Thus it appears that the only reason why the expression "common carrier" was not applied to the defendant in the *Liver Alkalai Co.*[1] case was that the Court did not consider it necessary to decide the question of liability for refusing to accept goods offered. The report shows that the test applied was that propounded earlier in this judgment viz. did defendant offer himself to carry for anyone? The words used by Blackburn, J., at page 340 were:—

> ".....which means, as we understand the evidence, that the flats did not go about plying for hire, but were waiting for hire by anyone."

In this case the tongkangs were not awaiting hire by anyone. As I have already stated earlier in this judgment there was a large and important class of persons for whom the respondent was precluded from carrying and apparently he reserved to himself the right to carry, or not to carry, for persons who were not registered with the Association as having contracts with other tongkang owners. These two factors, in my opinion, distinguish this case from the *Liver Alkalai Co.*[1] case. In short, the position of the Penang tongkang owners, though they have adopted the name of "lightermen", is not precisely the same as persons so designated in England.

Even if I am mistaken in regard to the foregoing there is evidence to show that there was a special contract between respondent and appellants though it was apparently an oral contract. One of the terms of that contract is fairly obvious *viz.* that respondent will always carry goods for the appellants whether he has space available in his craft or not. In the case of the voyage under consideration, when appellants' agent called upon the respondent to carry the betel-nuts, the respondent had no lighter available so his clerk, without reference to any higher authority, went out and chartered a tongkang. Apart from this being evidence in support of the existence of a special contract, this chartering of a tongkang re-inforces the view that respondent was not acting as a common carrier for the purposes of this voyage. For, although a common carrier must accept any goods offered, he need only do so to the limit of his carrying capacity: he is not compelled to hire additional transport if his lighter is already loaded to capacity or otherwise engaged. (*Jackson v. Rogers*[7]).

For the foregoing reasons I am of opinion that respondent was not, for the purposes of this case, either a common carrier or under the liabilities of a common carrier but that he was employed under the terms of a special contract with the appellants. In my opinion, therefore, this appeal should be dismissed.

Appeal allowed.